

Belcor, Inc. d/b/a San Jose Care and Guidance Center and Hospital and Institutional Workers Union, Local 250, Service Employees International Union, AFL-CIO, Case 32-CA-2367

September 15, 1982

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 17, 1980, the National Labor Relations Board issued its original Decision and Order in this proceeding granting the General Counsel's Motion for Summary Judgment, and finding that the Respondent, Belcor, Inc. d/b/a San Jose Care and Guidance Center, had committed unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by refusing to bargain with the Charging Party, Hospital and Institutional Workers Union, Local 250, Service Employees International Union, AFL-CIO.¹ Thereafter, the Board petitioned the United States Court of Appeals for the Ninth Circuit for enforcement of its Order. On August 7, 1981, the court denied enforcement and remanded the proceeding to the Board for the purpose of holding an evidentiary hearing regarding certain of Respondent's objections to conduct affecting the outcome of the underlying representation election.² Such a hearing was conducted on March 18, 1982, by Administrative Law Judge James M. Kennedy. On July 6, 1982, the Administrative Law Judge issued the attached Decision on Remand in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision on Remand in light of the exceptions and brief and has decided to affirm the rulings, findings,³ and conclusions of the Administra-

tive Law Judge and to adopt his recommendations.⁴

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Belcor, Inc. d/b/a San Jose Care and Guidance Center, San Jose, California, its officers, agents, successors, and assigns, shall take the action set forth in the Board's Order in 248 NLRB 1201, restated in full as follows:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Hospital and Institutional Workers Union, Local 250, Service Employees International Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time housekeeping department employees, including housekeepers, laundry workers and janitors; dietary department employees, including cooks and kitchen aides; and nursing department employees, including licensed vocational nurses, psychiatric attendants and technicians, and activities assistants, employed by Respondent at its San Jose, California facility; excluding all other employees, registered nurses, charge nurses, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and

¹ 248 NLRB 1201.

² 652 F.2d 856.

³ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Respondent has also excepted to the Administrative Law Judge's finding that neither Union Business Agent Manley nor Union Regional Director Gerstenlauer actually gave a speech at the July 5, 1979, meeting, which Respondent contends constituted a captive audience speech within the proscription of the Board's decision in *Peerless Plywood Company*, 107 NLRB 427 (1953). We need not pass on this exception since, regardless of whether either Manley or Gerstenlauer actually gave a speech to the employees present at the gathering in question, the Administrative Law

Judge has correctly concluded that this gathering is in any event well outside of the proscription against captive audience speeches set out in *Peerless Plywood*.

⁴ Respondent excepts to the Administrative Law Judge's recommendation that the Board reaffirm the bargaining order issued against Respondent in remedy of Respondent's unlawful refusal to bargain in 248 NLRB 1201. In support of this exception, Respondent argues that it has not been under a lawful obligation to bargain with the Union during the pendency of the resolution of its objections to the election which resulted in the Board's certification of the Union as the representative of the instant employees. We find no merit in Respondent's exception in this regard. *Salem Village I, Inc.*, *Salem Village II, Inc.*, and *Salem Village III, Inc.*, 263 NLRB No. 111 (1982).

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and the General Counsel's memorandum of points and authorities, I make the following:

FINDINGS OF FACT

The burden of proving the facts contained in the two objections in question is on Respondent. In support of its objections it called as witnesses three employees, one management official, and one union official.³ The employee witnesses were Rick McGiffin, Elvira Virgen, and Angela Morales.

I. CARD SOLICITATION

McGiffin testified that, when he and some other employees first contacted the Union regarding representation, its business agent, Martin Manley, told them that it was up to the employees themselves to do the organizing. Accordingly, McGiffin and approximately five other employees engaged in most of the authorization card solicitation. There may have been occasions when a union official did so as well, but most of the signatures were obtained by McGiffin and two others, all of whom obtained approximately the same number. These same individuals also passed out union buttons and literature. McGiffin testified none were hired by the Union and Manley gave them no authority to act on behalf of the Union. Manley did, however, suggest that they organize union meetings and even suggested that a party be held in furtherance of the drive. Meetings were conducted at various places, including the Union's office, a church, and a pizza parlor.

During the course of the card solicitation McGiffin, on separate occasions, spoke to Virgen and Morales. Virgen was an assistant cook. Unlike most of the Hispanic kitchen employees she was bilingual. She testified that on one occasion in the lunchroom McGiffin spoke to her, some other kitchen employees, and a janitor. These employees were Elena Avila, Trinidad Avila, Mercedes Ibarra, and Pedro (last name unknown). Virgen says McGiffin asked her to translate for the group. She testified: "Rick asked me if I could translate to the other people and he said that if we would like to sign the card because if the Union would come in, it would prevent us from paying \$25 of initiation fee and if we didn't sign the card, then it meant that if the Union was in, then we would have to pay the \$25. So, we decided to go ahead and sign, because we didn't want to pay the \$25 initiation." Virgen testified that she signed a card and she observed others signing as well.

Sometime later, according to Virgen, she had a question regarding election procedures. She sought out McGiffin to ask him whether the Spanish-speaking employees would be able to read the ballot. She says McGiffin told her he did not know.

Virgen explained that she sought out McGiffin because she knew he had solicited signatures. Even so, she said, she did not know what role McGiffin was actually play-

ing in the organization campaign. She testified that she thought he represented the Union but immediately tempered her opinion: "I'm not saying that he was authorized by [the Union], but, you know, he had the cards. So, if I had any questions to ask, I would assume that I would go to him. So I did."

On cross-examination Virgen said her first meeting with McGiffin in which he solicited signatures occurred as a result of the kitchen employees' request, not McGiffin's. She said the people who were working in the kitchen told her McGiffin had the cards and they did not want to pay initiation fees. They asked Virgen to talk to McGiffin. It was as a result of their request that the meeting occurred in the first place. Virgen even agreed that she realized McGiffin, while soliciting the cards, was not acting in an official capacity for the Union.

Virgen testified on further cross-examination that she attended no actual union meeting although once a union representative visited her home. She was not sure of his name. During their conversation she recounted McGiffin's statement to the kitchen employees and complained, saying she believed McGiffin was soliciting support in the wrong way. According to Virgen, the union official agreed. He told her McGiffin should not have said that if the employees signed the cards they would not have to pay the initiation fee. He told her the cards had nothing to do with the initiation fee.

Morales, then a psychiatric assistant like McGiffin, testified that McGiffin, in the presence of another psychiatric assistant, Rose Sandoval, asked her to sign an authorization card. The conversation occurred in a side yard during a class. She is not sure if McGiffin was teaching the class or if he came to her while the class was in progress. She testified: "We were out there sitting down and he asked us to sign a card and I said that I wasn't interested in the union and he said that—sign the card because—Well, it was to enter the union, you know, like if I had to sign the card. And then he said it cost \$35 to get in the union and then I said, 'Well, I couldn't afford it.' So, he said 'Sign the card now and you won't have to pay the fee when the union came in.'"⁴

Morales was not certain if Sandoval signed the card at that time or not. She also testified that on occasion she observed McGiffin passing union literature and buttons and leaving both in the employee lounge. She remembers McGiffin told the employees about union meetings, asked them to attend, and later tried to persuade her to vote.

Morales never attended a union meeting and once, before McGiffin persuaded her to sign the card, rebuffed a union organizer in the parking lot telling him she was not interested in joining.

McGiffin, although conceding that his memory is poor with regard to specific conversations, nonetheless testified with clarity regarding initiation fee matters. He testified that when he first began soliciting signatures he said nothing regarding initiation fees and no employee asked what they were. He testified initiation fee questions did not begin until after the election had been arranged. He

³ In addition, Respondent called a second management official in an effort to make a record regarding prejudice due to passage of time. While this issue is not before me and will not be considered, I should note for reviewing authority that Respondent did not seek to compel by subpoena the appearance of certain employees whose current addresses it knew.

⁴ The quoted language has been edited for punctuation and clarity.

says not even Manley discussed fees until after Respondent issued some campaign literature dealing with that topic.

On June 11, the Union issued a one-page bulletin announcing the election, 3 weeks hence. One of the paragraphs specifically dealt with the initiation fee question. It stated:

AS A MEMBER OF A NEWLY ORGANIZED FACILITY, YOU PAY NO INITIATION FEE TO JOIN LOCAL 250. Workers hired after the contract is approved will pay \$25.00 initiation fee over a 4-month period to join the Union.

Robert Gerstenlauer, the Union's regional director, testified that the wording in the bulletin was consistent with the Union's initiation fee policy for the 8-1/2 years he has been regional director. He thought the policy had been the same for 3 years prior to that. As his testimony occurred in 1982 and the conduct occurred in 1979, it is apparent that the policy has been in effect since at least 1974 and possibly as early as 1970. He says he explained the policy at the pizza parlor meeting in May.

In any event, McGiffin testified that in general he told any employee who asked that the Union's initiation fee was \$25 but would not apply to anyone who was then working for the Company, only subsequent employees.

McGiffin remembers asking Virgen to sign but said that, because she was Spanish-speaking, his fellow solicitor, Contreras, also Spanish-speaking, was more likely to have dealt with Virgen. He had no other recollection about the solicitation of Virgen's card. He also remembers asking Morales to sign an authorization card two or three times and telling her what the dues and initiation fee were. He says he tried to explain to her on at least one occasion that the initiation fee did not apply to the people who were employed at the facility at the time. He remembers he and the other organizing employees continued to solicit cards even after the election was actually arranged.

Analysis

A fair amalgamation of the testimony leads to the conclusion that, as asserted by the Union, it was at all times during this organizational campaign, and for years beforehand, the Union's policy to waive initiation fees and dues for the entire bargaining unit until a contract was actually signed. The fee was to be levied on employees hired thereafter. Beginning with that premise, it seems unlikely that an employee organizer would solicit in a manner inconsistent with the policy. In this particular instance it is undisputed that McGiffin did not even know what the policy was until June 11. While it is possible that his ignorance of the policy prior to that time may have led him to misstate it, the probability is to the contrary. Furthermore, Virgen admits she learned McGiffin's supposed statements to her were incorrect. Yet, when she discovered the actual policy she appears to have done nothing to revoke her card. Furthermore, once she knew the truth about the Union's initiation fee policy, had she been acting reasonably, she would have attempted to correct the misunderstanding held by the

other kitchen employees. There is no evidence that she did.

I note, in this regard, that the meeting with McGiffin occurred only because the kitchen employees had asked for it and they already held the belief that signing the cards would constitute a waiver of the initiation fee. That being the case, it is likely that their previously held misapprehension of the policy may not have been clearly transmitted to McGiffin. Yet, he could not have cleared it up even if he had understood their misapprehension because he did not know the answer. The probability of confusion here is high, but the probability that McGiffin caused it is quite low. A great deal seems to have been lost in translation.⁵ I am much puzzled by Virgen's failure to clear it up once she had the opportunity, after having spoken to the union official. Moreover, McGiffin's testimony that Contreras would have been primarily responsible for dealing with the Spanish-speaking employees seems quite logical. Accordingly, I conclude that Respondent has failed to prove that McGiffin improperly solicited the authorization cards from Virgen and the other kitchen employees.

Furthermore, with respect to soliciting Morales' signature, McGiffin's denial is at least as credible as her testimony. Given the Union's policy it appears unlikely that he would have made a statement which could be easily shown to be false. A false statement would tend to discredit the organizers in the minds of their fellow employees and would undermine the organization drive itself. I note Morales testified that the initiation fee was \$35, rather than the actual \$25. This discrepancy tends to show that her memory suffers from the same disability as his—passage of time. I am not prepared to discredit either of them on such flimsy grounds. The probabilities favor the conclusion that McGiffin would not have deviated from an announced policy. Accordingly, I find that Respondent has failed to prove that McGiffin engaged in an improper solicitation of Morales' authorization card.

In any event, in view of Virgen's recognition that McGiffin was not acting in an official capacity, and McGiffin's own testimony that Manley did not authorize him to act on behalf of the Union, McGiffin cannot be found an agent of the Union or even its apparent agent. As the court recognized, his serving as the Union's election observer, card soliciting, and distribution of organizing literature and materials are not sufficient to render him an agent. He had no official capacity or authority and his conduct therefore is not imputable to the Union. *Mike Yurosek & Sons, Inc.*, 225 NLRB 148 at 150 (1976), *affd.* after refusal to bargain proceedings *N.L.R.B. v. Mike Yurosek & Sons, Inc.*, 597 F.2d 661 (9th Cir. 1979), *cert. denied* 444 U.S. 839 (1979).

In view of the fact that Respondent has been unable to show by a preponderance of the evidence that McGiffin offered to waive the initiation fee of employees who signed authorization cards, I shall recommend that this objection be overruled.

⁵ I am aware that Virgen testified that she translated word for word, yet I tend to doubt her here. Her English is just not that good.

II. THE JULY 5 PARTY

During the first week of July some of the employees who were interested in organizing Respondent on behalf of the Union decided to hold a party at a private residence where several employees lived. To this end, on July 1 or 2, two different notices were published, each in a different hand. They were posted on bulletin boards in the employees' lounge and the nurses stations. They read:

"EMPLOYEE'S
ATTENTION" [PARTY] [PARTY]

[7:00] = TALK & INSPIRATION
[8:00] = "PARTY" WHERE? 2314
SHADETREE LANE, SAN JOSE, CALIF.
WHEN = JULY 5TH THURSDAY [map
showing directions]

"MANDATORY ATTENDANCE"

BYOB
or
WHATEVER

* * * * *

PARTY!

THERE WILL BE A PARTY
FOR EVERYONE WHO WORKS AT CARE
AND GUIDANCE ON:

THURSDAY, JULY 5 [MAP SHOWING
DIRECTIONS]
2314 SHADE TREE LANE
8:00 p.m.

(Come at 7:00 if you have questions about the
Union—we will have somebody from Local 250 to
answer questions).

BRING YOUR OWN

Respondent argues that because the phrase "mandatory attendance" is found in the first notice and because the word "everyone" is emphasized in the second notice, the Board should find that this party/union meeting constituted a captive audience speech. It should be observed that the election was scheduled to begin at 2 p.m. the following day; thus the party/union meeting was within the 24-hour period preceding the election.

The only evidence which Respondent could adduce regarding the meaning of those two phrases was testimony from McGiffin. He testified that he did not participate in drawing either notice and did not live at the address in question. He was aware of the posters but can only guess that the phrase "mandatory attendance" was placed by the writer as an apparent "inside joke" discernible to Respondent's employees. He noted that Respondent commonly conducted training sessions on company time which were invariably noticed with the phrase "mandatory attendance." Respondent could produce no other employee having any better knowledge than did McGiffin. It called no witness who lived at the residence.

It did present the testimony of Esther McAbee *nee* Harperstead, the then administrator of the facility. She testified that on two separate occasions employees Sandoval and Thomas, both nurses assistants, approached her in dismay because they believed they were being required to attend an off-duty party where union people would be present. Harperstead only replied that she had "no knowledge of what would be discussed." When I asked her if she told either Sandoval or Thomas that the Company had nothing to do with the party, she did not directly answer the question, instead saying, "Since I didn't post the notice, then the Company did not have anything to do with it." From that answer I conclude she did not tell the employees that Respondent had nothing to do with the party, though she had ample opportunity to do so.

Furthermore, it appears that although both Manley and Gerstenlauer were present at the party, arriving some time after 7 p.m., neither gave a speech. They circulated among the employees present, answered a few questions, and, when the questions ceased, left.

Analysis

The Board, in *Peerless Plywood Company*, 107 NLRB 427 at 429 (1953), announced: "Accordingly, we now establish an election rule which will be applied in all election cases. This rule shall be that employers and unions alike will be prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election. Violation of this rule will cause the election to be set aside whenever valid objections are filed." (Emphasis supplied.) Immediately after the rule was published the Board explained and modified it slightly in *Livingston Shirt Corporation, et al.*, 107 NLRB 400 at 408 (1953):

It should, perhaps, be pointed out that, even during the 24-hour period, the employer and the union still have the right to use all lawful means of persuasion, including speech, subject only to the one qualification that they cannot assemble employees on company premises during working hours for the purpose of addressing them en masse. They may issue statements, talk to individual employees, write letters to them, or even invite them to listen to a speech on or off the employer's premises, so long as the occasion is on the employees' own time and their attendance is voluntary.

With the rule in mind it is readily apparent that it has no application to the instant case. While it may be possible for a union to conduct such a captive audience speech it would normally need the cooperation of the employer and it must occur on both company time and premises. Thus, it is highly unlikely that a union could breach the rule in cases where the employer, as here, actively campaigns against representation. This fact was early recognized by Judge Soper in his dissent in *N.L.R.B. v. Shirlington Supermarket*, 224 F.2d 649 at 656 (4th Cir. 1955). The inherent probability that the Union breached the rule here is, therefore, very low; so low

that one must wonder what facts were before the court causing it to remand for a hearing. There is simply no evidence that the rule was, or even could have been, breached.

First, the party/meeting was known to have taken place at a private residence, not on company premises. Second, Respondent knew full well the party/meeting was not on company time, yet it took no steps to correct the misapprehensions of two concerned employees even though its administrator had full opportunity to do so.⁶ Third, the notices do not even state that a union official was to conduct a speech. The first notice refers to a "talk and inspiration," but does not mention the identity of the speaker. The second notice only says a Local 250 representative would be present to answer questions. Indeed, the testimony clearly shows no speech actually

⁶ The case cited by Respondent, *United States Gypsum Company*, 115 NLRB 734 (1956), is not helpful. There the union, shortly before the election, made speeches to the voters inside the plant using mobile loudspeakers located on the streets outside. In effect, the employees became a captive audience and the Board therefore overturned the election.

occurred.⁷ Moreover, the fact that each notice sets forth two different arrival times, 7 and 8 p.m., negates any suggestion that the "talk" was mandatory. Finally, Respondent's reference to "everyone" in the second notice as evidence of the party's mandatory nature is nonsense. In this context the phrase "mandatory attendance" on the first notice was perceived readily and correctly by the Acting Regional Director as not cognizable under the rule.⁸

I conclude, therefore, that this objection, too, is without merit. Accordingly, I hereby make the following:

RECOMMENDATION

Upon the foregoing findings of fact, pursuant to the remand orders of the United States Court of Appeals for the Ninth Circuit and the Board, I recommend that the Board reaffirm the remedial order it issued in *Belcor, Inc. d/b/a San Jose Care and Guidance Center*, 248 NLRB 1201 (1980).

⁷ The rule does not prohibit conversations with individual employees. *Electro-Wire Products, Inc.*, 242 NLRB 960 (1979).

⁸ For what it's worth, McGiffin's perception of it as a joke is no doubt accurate.